

REMARKS

All claims stand rejected under the judicially created doctrine of obviousness-type double patenting. The claims are rejected in view of claim of U.S. Patent Nos. 6,534,679, 6,320,077, and 6,229,046. The current application claims priority back to each of these patents.

The Examiner states that the claims of the references are not identical to the claims of the current application, and notes some differences between the claims. The claims appear to be rejected over the claims of the references plus the disclosure of the references. The Examiner states that "it would have been obvious to one of ordinary skill in the art to select the steps from Figures 3, 9, and 7 in the references to include in the claims of the references." See page 2, last paragraph of the Office Action.

However, the determination for obviousness-type double patenting is whether any claim in the application defines an invention that is merely an obvious variation of an invention claimed in the patent. A double patenting rejection is "analogous to the nonobviousness requirement of 35 U.S.C. §103" except that the patent principally underlying the double patenting rejection is not considered prior art. *In re Brathwaite*, 379 F.2d 594 (CCPA 1967). Thus, the comparison should be between the claims of the current application and the claims of the references.

This is also described in MPEP 804 II.B.1., where it states "when considering whether the invention defined in a **claim** of an application is an obvious variation of the invention defined in the **claim** of a patent, the disclosure of the patent may not be used as prior art." (emphasis added). It does go on to describe that the disclosure may be used for some purposes, such as for definition.

Therefore, we see that an obviousness-type double patenting rejection should be based on a comparison of the claims. Further, the Examiner has stated that the patent claims do not include the steps as claimed in the present application. Therefore, Applicants ask that the rejection be withdrawn and all claims allowed.


It is believed that this application is in condition for allowance. Early notice to this effect is earnestly solicited.

Respectfully submitted,

MERCHANT & GOULD P.C.
P.O. Box 2903
Minneapolis, Minnesota 55402-0903
(612) 332-5300

Date: September 26, 2005




Dennis R. Daley
Reg. No. 34,994
DRD:jjb